SUPREME COURT, U. S.

MAY 22 1975

MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

_____ TERM, 1975

NO. 74-1472

SAM JOHN PASSARELLA,
Petitioner,

v.

STATE OF NORTH CAROLINA.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES SUPREME COURT

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May 16, 1975

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IN THE

SUPREME COURT OF THE UNITED STATES

_____ TERM, 1975

NO._____

SAM JOHN PASSARELLA,
Petitioner,

v.

STATE OF NORTH CAROLINA.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES SUPREME COURT

The Petitioner, Sam John Passarella, prays that a Writ of Certiorari issue to review the opinion and judgment of the Court of Appeals for the State of North Carolina, said judgment certified on November 18, 1974. Said judgment of the Court of Appeals of the State of North Carolina was appealed to the Supreme Court of North Carolina and also a Petition of Certiorari was included with the appeal

to the Supreme Court of North Carolina, said appeal and Certiorari was denied for lack of a substantial constitutional issue on December 30, 1974. (A-3) That the Petitioner made application for an extension of time for filing this Writ of Certiorari in the United States Supreme Court because of a serious illness and said Petition was granted by the Honorable Warren E. Burger, Chief Justice of the United States Supreme Court, extending the time for filing to May 29, 1975. Said extension was granted on the 20th day of March, 1975. (A-4).

JURISDICTION

The date of the certification of the North Carolina Court of Appeals opinion was November 18, 1974. (A-2) The date of the final judgment rendered by the Supreme Court of North Carolina denying certiorari and denying the appeal was December 30, 1974. (A-3) The date of the

order for extending the time for applying for a Writ of Certiorari was March 20, 1975, said extension being until May 29, 1975. (A-4).

That the jurisdiction of the Supreme Court of the United States is invoked in this case by Title 28 of the United States Code Section 1257 (3) in that this writ has been submitted in apt time including the sixty day extension from the date of the judgment of the highest State Court of the State of North Carolina denying Defendant's appeal from the Court of Appeals of North Carolina and denying the Defendant's Writ of Certiorari from the Court of Appeals of North Carolina.

CONSTITUTIONAL PROVISIONS

The above-entitled case involves the denial of the Defendant's right against an unreasonable search and seizure of his person as guaranteed by the Fourth Amendment of the United States Constitution

set out as follows:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized."

The Fourth Amendment was applied to the State of North Carolina by the Fourteenth Amendment to the Constitution of the United States Paragraph 1 as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws."

QUESTIONS PRESENTED FOR REVIEW

Did the trial Court commit error in denying the Defendant's motion to suppress the evidence that was introduced at the

trial, because said evidence was obtained by unlawful and unreasonable search and seizure denying his constitutional rights under the Fourth and Fourteenth Amendment to the Constitution of the United States?

STATEMENT OF THE CASE

This was a criminal action instituted in the Superior Court of the General Court of Justice of New Hanover County, Wilmington, North Carolina, in where the Defendant was tried upon an indictment charging him with the crime of feloniously possessing cocaine with intent to distribute it. Upon his plea of not guilty, a voir dire examination was held to test the validity of the search of the Defendant's person. The testimony on the voir dire was as follows:

Mr. John K. Walker, an S.B.I. agent for the State of North Carolina testified that on September 18, 1973, he saw the Defendant in Fayetteville, North Carolina in the presence of two white males in a

vehicle. That he came to Wilmington and met another S.B.I. agent relying upon information from a confidential source he had received in Fayetteville, North Carolina, that the Petitioner was coming to the Wilmington area and also that he had narcotics in his possession. He further testified that he knew the confidential source and he had given him information in the past that had proven to be true and correct and that he gave him the information during the A.M. hours on the 18th day of September.

The S.B.I. officer Walker further testified that the first time he saw Mr. Passarella was on Third Street in the City of Wilmington, traveling in a northern direction with two other subjects with him. That he and the other S.B.I. agent stopped the vehicle on Highway 117, in the City Limits of Wilmington, and advised the Petitioner and the other passengers that

they were law enforcement officers and told them of his purpose. That they had information from a confidential source that Mr. Passarella was in possession of narcotics or that somewhere in the vehicle there were narcotics and they were going to conduct an emergency search of the passengers in the vehicle and the vehicle for narcotics. That the vehicle was stopped at a Texaco Service Station and one of the passengers was taken in the service station by an S.B.I. agent and Officer Bill Wolak of the Wilmington Police Department and was searched. Walker testified that he then received information from the same confidential source that a few minutes before the vehicle was stopped the confidential source had seen a controlled substance in the vehicle. Based on this information all of the officers and the Defendant were removed to the

Sheriff's Department and they obtained a search warrant for the Defendant and other officers searched him in a room of the jail and found the evidence in this case, cocaine.

Counsel for Petitioner read the affidavit and the search warrant which on the face of it showed that the officer received the information for the basis of the search warrant for the person of Petitioner in the A.M. hours into the record. Walker testified that it was a mistake and a misunderstanding.

Officer Wolak, one of the police officers immediately at the scene testified that he searched Sam Passarella, the Petitioner, at the Texaco Service Station on September 18, 1973, and that he stripped him of all of his clothing, including his underwear and socks. He further testified that he and the S.B.I. agent asked him to bend over and examined him in the rear portion

of his body and that he did not recall looking all through his hair but it was possible. He further testified that he did not find any kind of controlled substance on his person or his clothes. He testified that he searched him as best he could with the space available in the restroom. Officer Wolak further testified that he was not the officer making the determination as to whether to take him to the Police Station and search him where there would be plenty of room and space.

The S.B.I., Officer Walker further testified that in the affidavit for the search warrant of the Petitioner's person there was nothing mentioned about the car or searching the Petitioner earlier at the service station. He further testified that he searched him at the service station at approximately 3:30 P.M. and did not get the search warrant for his person until

5:00 o'clock P.M. He further testified in his opinion the Petitioner would not have been able to leave between the time they stopped him at 3:30 P.M. and the time the warrant was taken at 5:00 o'clock, however, nowhere in the testimony is there any evidence that Mr. Passarella at any time was placed under arrest until the narcotic substance cocaine was found in his pocket after the search warrant was obtained and the search of his person was made in the jail. The Trial Court of the Superior Court of the General Court of Justice for New Hanover County overruled the Defendant's motion to suppress this evidence because it was illegally obtained by an unlawful search and in violation of his constitutional rights under the Fourth and Fourteenth Amendments of the Constitution of the United States.

The trial went forward with the evidence presented over the Petitioner's ob-

jection, and the Defendant was ultimately convicted of possession of cocaine with intent to distribute and sentenced to not less than three nor more than five years in the common jail of New Hanover County. (A 1). The Defendant in open Court gave notice of appeal to the North Carolina State Court of Appeals and followed up his appeal but the Court of Appeals entered judgment certified on November 18, 1974 denying his appeal and upholding the conviction. (A 2). The Defendant in apt time gave notice of appeal and in the same notice applied for Writ of Certiorari to the State of North Carolina Supreme Court for a hearing on the constitutional issue of whether there was unreasonable search and seizure of the Defendant's person. Said notice of appeal and Writ of Certiorari was denied by judgment of the Supreme Court of North Carolina on December 30, 1974. (A 3). The Defendant then applied for an extension

of time to the Supreme Court of the United States due to illness of Petitioner's counsel, said extension of time being granted by the Honorable Chief Justice of the United States Warren E. Burger on March 20, 1975 giving the Petitioner until May 29, 1975 to file his Writ of Certiorari on these constitutional questions. (A-4).

ARGUMENT OF COUNSEL AS TO
THE FACTS AND LAW OF THE QUESTION

BRIEF

It is well settled that since Mapp v. Ohio, 367 U.S. 643, 6 L. ed. 2d 1081, 81 S. ct. 1684 (1961), that as a matter of due process evidence obtained by a search and seizure in violation of the Fourth Amendment is admissable in State Court as it is in a Federal Court.

In Mapp v. Ohio, supra, Mr. Justice Clark stated that there could be no fixed formula as we are admittedly met with

recurring questions of the reasonableness of searches. He went on to comment "however much in a particular case insisted upon such rules may appear as a technicality that inures to the benefit of a guilty person, the history of the criminal law proves that tolerance of shortcut methods in law enforcement impairs its enduring effectiveness." He cited Miller v. United States, 357 U.S. 301, 313, 2 L. ed. 2d 1332, 1340, 78 S. ct. 1190 (1958) as authority for that quotation.

In Ker v. State of California, 374 U.S. 23, 10 L. ed. 2d 726, 83 S. ct. 1623 (1963), the Court said "while the language of the amendment is general it forbids every search that is unreasonable; it protects all, those suspected or known to be offenders as well as the innocent". U.S. 33, 374 U.S.P. 33, 10 L. 2d P. 737. The Court in Ker v. State of California, supra, went on to state that the reasonable-

ness of a search is in the first instance a substantiative determination to be made by the trial Court but findings of reasonableness are respected only in so far as consistent with Federal constitutional guarantees and are not insulated from examination of the Supreme Court.

I cite the above cases as illustrations that the Supreme Court has always held the right of an individual against unreasonable search and seizures as being a very dear one and any infringement to be examined carefully. It is well documented that every allegation of an illegal search and seizure must be judged on its own facts and merits and that there are no set rules to go by. There is no question that the Supreme Court has ruled that if you have probable cause sufficient to get a search warrant you can stop and search an individual if the circumstances dictate. And that the probable cause

is dictated by factual and practical considerations of everyday life on which reasonable and prudent men act. Draper v. United States, 358 U.S. 307, 3 L. ed. 327, 79 S. ct. 329 (1959).

In the above case there is no question that the S.B.I. officers were proper in the original search of the Petitioner, the car and other persons. The Petitioner concedes that is the Federal law and also the law of the State of North Carolina.

However, the Petitioner asks the Court to examine the totality of the situation and consider all of the circumstances before deciding whether the second search with the warrant was reasonable or unreasonable.

The Petitioner cites a recent case Rios v. United States, 364 U.S. 253, 4 L. ed. 2d 1688, 80 S. ct. 1431 (1960), in which the Court stated that as in most cases of search and seizures resolution

of the question requires a particularized evaluation of the conduct of the officers involved. The Petitioner realizes that there is no factual similarity in that case with the case that is the subject of this writ but cites it for the reasoning and guidelines that the Petitioner hopes the Court will follow in examining this particular case.

In Sgro v. United States, 287 U.S. 206, 77 L. ed. 260, 53 SCR 138 (1932), the Court stated that the proceeding by search warrant is a drastic one and that its abuse led to the adoption of the Fourth Amendment and should be liberally construed in favor of the individual. In that case there was an issuance of a second warrant only by changing the date and the conviction was reversed. The Petitioner again says that does not meet the factual situation here but it gives an insight as to the

Court's feeling on search warrants and the importance of that power not being abused.

Sgro v. United States, supra, was cited in United States v. Neal, 500 Fed. 2d 305, (1974), which reiterated the general principle that the Fourth Amendment contemplates probable cause for the issue the search warrant to exist at the time the search is sought to be made.

The Petitioner argues that in the present case the police officers took advantage of his rights in that they had two bites at the apple. They had plenty of officers and stopped the Petitioner's car at a place of their choosing. They made an emergency search which the Petitioner concedes was valid, under conditions of their choice and a place of their choice. There is nothing appearing in the record to keep them from transporting the Petitioner and the vehicle to the jail for search

or for the purpose of getting a search warrant for the vehicle and the person of the Petitioner.

In United States v. Bradshaw, 490 Fed. 2d 1097 (1974) the Court held "to summarize, we hold that, since two of the agents could have guarded the truck smelling of moonshine whiskey while the third obtained a warrant without significant risk of loss of evidence, the search and seizure in this case violated the Fourth Amendment that the fruits thereof should have been suppressed". This was a North Carolina United States District Court for the Western District of North Carolina where three officers went on the Defendant's premises walked to his car and smelled the moonshine and then conducted a plain view search and confiscated moonshine in the vehicle.

In comparing this case to this case it would seem there is a good parallel

in that there was nothing to keep the officers from holding the Petitioner in custody as they did and taking him to proper facilities for search or holding him and getting a warrant for his person and searching him.

The Court of Appeals of North Carolina in their decision said that the police officers of North Carolina have the right to stop an individual on a valid emergency search and then upon not finding anything are able to hold him for approximately two hours and obtained a search warrant for his body based on the same information that they had to base their emergency search on. If this is going to be the law of the State of North Carolina and the rest of the nation then I feel we are giving the police officers unlimited privilege to treat the citizens as they wish if they have information from a reliable source that they have in their pos-

session narcotics. I argue that the reason this question has never been decided is that the facts in this particular case are so unusual that it has never had to be considered before.

If the decision of the Court of Appeals of North Carolina is allowed to stand, then in effect you are saying that a police officer on reliable information can stop an individual and search him completely at a place of his choice and upon finding nothing can hold him and upon the same information that was given to him to start with being reiterated the second time by the same informant can get a search warrant for his person and search him again. Following this theory of law what would keep the police officer from holding an individual indefinitely as long as the same informer kept telling that I saw the narcotics on him before you stopped him, over and over again? Following this

theory every time he told him this he could take out another search warrant and search his body.

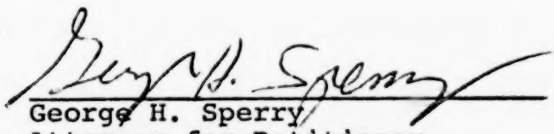
I argue that this type of conduct by law enforcement officers is exactly what the Fourth Amendment was passed for and exactly what the Federal Courts have based their opinions on in regulating the searches and seizures of individuals, examining each case closely as to all of the facts and circumstances surrounding the search as to whether it was unreasonable or not.

CONCLUSION OF ARGUMENT

In conclusion I argue that based on the basic theories that the Court has expanded on search and seizures before and after Mapp v. Ohio, supra, upon consideration of all of the facts and circumstances surrounding this search and seizure including the conduct of the police officers

it should reverse the opinion of the North Carolina Court of Appeals, and hold that this particular search was unreasonable considering all of the circumstances. The Petitioner asserts that this particular factual situation and ruling of the Court of Appeals of the State of North Carolina is a ruling on the application of the Fourth and Fourteenth Amendments to the Constitution of the United States to an individual of this country which has not been ruled on before in any jurisdiction and which raises a substantial constitutional question as to whether the Petitioner was subjected to an unreasonable search and seizure and is worthy of consideration by this Court. Petitioner further asserts the North Carolina Court of Appeals did not decide the question in

agreement with prior decisions of the Supreme Court of the United States.



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OPPOSING COUNSEL:

ZORO J. GUICE
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P. O. Box 25201
Raleigh, North Carolina

CERTIFICATE OF SERVICE

This is to certify that I have this 21st day of May, 1975, served 3 copies of the Petition for Writ of Certiorari in the Supreme Court of the United States upon Mr. Zoro J. Guice, Jr., Assistant Attorney General, State of North Carolina, Department of Justice, P. O. Box 25201, Raleigh, North Carolina, in the case of State of North Carolina vs. Sam John Passarella, 745 SC 756, by depositing three (3) copies in the U. S. Mails with first class postage prepaid.

George H. Sperry

STATE OF NORTH CAROLINA File #73-CR-15491
IN THE GENERAL COURT
COUNTY OF NEW HANOVER OF JUSTICE
SUPERIOR COURT DIVISION

The State of North Carolina

VS. CORRECTED JUDGMENT AND COMMITMENT

Sam John Passarella.

Name, age, sex and race of Defendant

White, Male

In open Court, the defendant appeared for trial upon the charge or charges of possession with intent to distribute cocaine and thereupon entered a plea of not guilty.

Having been found guilty of the offense of possession with intent to distribute cocaine by a jury which is a violation of and of the grade of felony.

It is ADJUDGED that the defendant be imprisoned for the term of not less than three (3) nor more than five (5) years in the Common Jail of New Hanover County assigned to work under the supervision of the North Carolina Department of Correction.

It is ORDERED that the Clerk deliver two certified copies of this judgment and Commitment to the Sheriff or other qualified officer and that said officer cause the defendant to be delivered, with such copies as commitment authority, to the appropriate official of the State Department of Correction.

This 24th day of June, 1974.

/s/ L. Bradford Tillery
Presiding Judge

Attorney for Defendant: George H. Sperry

Attorney for the State: W. A. Cobb

Date certified copies of judgment delivered to Sheriff for commitment: 6-25-74

No. 745SC756 FIFTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

STATE OF NORTH CAROLINA

V. From New Hanover

SAM JOHN PASSAREALLA

Appeal by defendant from Tillery, Judge, 1 April 1974 Session of Superior Court held in New Hanover County. Heard in the Court of Appeals 15 October 1974.

Defendant was charged with possession with intent to distribute a controlled substance, cocaine, in violation of G.S. 90-95 (a)(1). Upon the jury's verdict of guilty, the trial judge imposed a sentence of not less than three years nor more than five years.

The State presented evidence which tended to show that law enforcement officers were advised by a previously reliable confidential informant that defendant had controlled substances in his possession; that on the basis of this information

officers stopped an automobile in which the defendant was riding in Wilmington, North Carolina; that officers immediately conducted a strip search of defendant and all other occupants of the automobile in the restroom of a nearby service station but found no controlled substances; that following the search, officers received additional new information from the same confidential informant that he had observed a controlled substance on defendant's person a short time before the automobile was stopped; that on the basis of this new information officers took the defendant to the New Hanover Sheriff's Department where they obtained a search warrant for his person; and that officers conducted a second and more thorough search of defendant pursuant to the search warrant and found controlled substances on his person in violation of the law.

The defendant did not testify in this case nor offer any evidence. By way of cross-examination of the State's witnesses, however, defendant brought out evidence tending to show that of the three men who were in the automobile he was the only one served with a search warrant and that he was the only one who was carried to the jail and caused to be stripped of his clothing and his body searched; that the rest room in which he initially was searched was not a place of his own choosing; and, finally, that after he was taken to the Sheriff's Department, a considerable time period elapsed before the materials which were offered into evidence were discovered.

Attorney General Carson, by Deputy Attorney General White and Assistant Attorney General Guice, for the State.

Burney, Burney, Sperry & Barefoot, by George H. Sperry for defendant appellant.

MORRIS, Judge. Defendant's only assignment of error relates to the denial of his motion to suppress the evidence that was introduced at trial. He does not contest the validity of the original search, but argues that the subsequent search of his person violated his constitutional rights against unreasonable searches and seizures. Defendant maintains that in these circumstances officers had the right either to search him immediately or take him to the courthouse, get a search warrant and then conduct a search. He argues that officers cannot be allowed to do both. We find no merit in this contention.

Defendant's broad assertion is unsupported by applicable law, nor do we feel such a rule should be the law. In our opinion, to require the officers to make such an election under these circumstances would place too heavy a burden

on law enforcement officers in the detection and investigation of criminal conduct. We conclude it would be neither reasonable nor practical to bind law enforcement officers to an election.

Additionally, we note that on voir dire the trial judge in this case made extensive findings of fact and based on these findings concluded as a matter of law that the serach of the defendant was valid. "These findings of fact by the trial judge are conclusive when, as here, they are supported by competent evidence." State v. Bass, 280 N.C. 435, 445, 186 S.E. 2d 384 (1972), and cases cited therein.

The trial judge's findings in this case support the conclusion that the officers had reasonable ground to believe that a felony had been committed by the defendant and that he might escape if he were not carried to the Sheriff's Department and a more extensive search conducted,

the officer having testified and the court having found as a fact that because of the restricted area of the room and the size of the occupants, the body search conducted in the rest room was not a thorough search. The new or additional information received from the informer was additional reason for a more thorough search.

No error.

Judges HEDRICK and BALEY concur.

NO. 6 FIFTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

Spring Term 1975

****

STATE OF NORTH CAROLINA	)	JUDGMENT DISMISSING TRIAL
v	)	
SAM JOHN PASSARELLA	)	(745SC756)

****

This matter came on to be considered upon motion of the Attorney General to dismiss the appeal of the defendant for lack of substantial constitutional question; upon consideration whereof, it is adjudged by the Court here, that the motion to dismiss the appeal be allowed; and that it be so certified to the said North Carolina Court of Appeals to the intent its decision be affirmed:

And it is considered and adjudged further that the defendant do pay the sum of THIRTY-SIX AND 15/100 ($36.15) DOLLARS and execution issue therefor.

Witness my hand and the seal of the Supreme Court, this the 30th day of December, 1974.

Adrian J. Newton
Clerk of the Supreme Court
of North Carolina

BY:

/s/ John R. Morgan
Assistant Clerk

cc:
Burney, Burney, Sperry & Barefoot,
Attorneys at Law
R. Bruce White, Jr., Deputy Attorney General
Zoro J. Guice, Jr., Assistant Attorney General
W. Allen Cobb, District Attorney

SUPREME COURT OF THE UNITED STATES

No. A-759

SAM JOHN PASSARELLA,
Petitioner

v.

NORTH CAROLINA

ORDER EXTENDING TIME
TO FILE PETITION
FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby extended to and including May 29, 1975.

/s/ Warren E. Burger
Chief Justice of the United States

Dated this 20th day of March, 1975.

STATUTES

Title 28 of the United States Code, Section 1257 (3)

Fourth Amendment to the Constitution of the United States

Fourteenth Amendment to the Constitution of the United States

CASE CITATIONS

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Rios v. United States, 364 U.S. 253, 4 L. ed. 2d 1688, 80 S. ct. 1431 (1960)

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